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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 012186

CASE NBR 84-1-01706 CFX
SHORT TITLE Pacyna, Clement J.
VERSUS Marsh, Sec. of the Army

DOCKETED: Apr 18 1985

Date	Proceedings and Orders
Apr 18 1985	Petition for writ of certiorari filed.
May 31 1985	Order extending time to file response to petition until June 28, 1985.
Jun 28 1985	Order further extending time to file response to petition until July 29, 1985.
Jul 26 1985	Brief of respondent Marsh, Sec. of the Army in opposition filed.
Jul 31 1985	DISTRIBUTED. September 30, 1985
Aug 7 1985	Reply brief of petitioner Clement J. Pacyna filed.
Oct 7 1985	REDISTRIBUTED. October 11, 1985
Dec 5 1985	Supplemental brief of petitioner Clement J. Pacyna filed.
Dec 11 1985	REDISTRIBUTED. January 10, 1986
Jan 13 1986	REDISTRIBUTED. January 17, 1986
Jan 13 1986	REDISTRIBUTED. January 17, 1986
Jan 21 1986	Petition GRANTED. Judgment VACATED and case REMANDED to

CONTINUE (

PROCEEDINGS AND ORDERS

DATE: 012186

CASE NBR 84-1-01706 CFX
SHORT TITLE Pacyna, Clement J.
VERSUS Marsh, Sec. of the Army

DOCKETED: Apr 18 1985

Date	Proceedings and Orders
Jan 21 1986	Petition GRANTED. Judgment VACATED and case REMANDED to transfer the case pursuant to 28 U.S.C. Section 1631 to the Court of Appeals for the Federal Circuit. See 28 U.S.C. Section 1295(a)(2). Opinion per curiam.

****

142

PETITION FOR WRIT OF CERTIORARI

84-1706 (1)

Office - Supreme Court, U.S.
FILED
APR 18 1985
ALEXANDER L. STEVAS,
CLERK

No.

In THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CLEMENT J. PACYNA,

PETITIONER,

v.

JOHN O. MARSH, JR.
SECRETARY OF THE ARMY,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CLEMENT J. PACYNA, Pro Se
1151 Wehrle Drive
Williamsville, New York 14221
(716) 632-4078

35 pp

QUESTIONS PRESENTED

1. Did the Court below err in barring suit since it was filed in 1983 on a cause of action accrued in 1982, conferred by 10 U.S.C. § 1552 and 28 U.S.C. § 1361?
2. Did the Court below err in holding "an attempt to pursue administrative remedies that begins after the limitations period has run does not revive the cause of action", since exhausting such remedies is required predicate to relief in civil courts?
3. Is the decision of the lower court sanctioned by the Court below legally correct since it is in conflict with the decisions of other federal appeals, claims and district courts on the same subject matter?
4. Whether the Court below has so far departed from the accepted and usual course of federal proceedings and question of federal law and so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision on a Veteran's claim?

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In THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CLEMENT J. PACYNA,

Petitioner,

v.

JOHN O. MARSH, JR.
SECRETARY OF THE ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CLEMENT J. PACYNA petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, A-1 is not reported. The opinion of the District Court (App. C. infra, C-1 is not reported.

JURISDICTION

The Judgment of the court of appeals was entered on 29 November 1984. A timely petition for rehearing was denied on 23 January 1985. (App. A and B, infra A-1 and B-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1/]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I: Congress shall make no law abridging the right of the people to petition the government for redress of grievances.

Constitution of the United States, Amendment V: No person shall be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

In this civil action, Petitioner seeks injunctive relief and monetary damages for violation of his civil and constitutional

1/ No other petitioner is involved in this petition.

rights pursuant to the First and Fifth Amendments to the United States Constitution and 10 U.S.C. § 1552 and 28 U.S.C. § 1361.

Petitioner, CLEMENT J. PACYNA, served honorably in the United States armed forces during World War II, and was discharged in September 1945. Thereafter, in July 1946 Petitioner re-enlisted in the United States Army and served as a counter-intelligence special agent.

In August 1952, Petitioner made application for appointment as a warrant officer in the Counter-Intelligence Corps (CIC), in accordance with applicable Army Regulations (AR) 610-15 and AR 600-148. Petitioner's application for appointment as warrant officer was favorably approved by his superior officers and a review board of officers, and the Army Surgeon General qualified him physically for appointment.

In a letter, dated 22 January 1952, Peti-

tioner was notified by his Commanding General that he had been tentatively selected for appointment by Headquarters First Army but that The Adjutant General informed that headquarters that he was not favorably considered. Significantly, the notification Petitioner received that his appointment had been denied, failed to contain any notification as to the required reasons for disapproval. Thereafter, attempts on Petitioner's behalf to obtain the reasons or explanation of the denial was met with the directive "you don't question higher authority". This attempt is contained in an Affidavit sworn 19 June 1981 by Petitioner. Petitioner's superior officers' Affidavit sworn 15 June 1981 and a letter dated 21 June 1982, attest to Petitioner's being more than worthy of appointment, and question lack of reason for the disapproval respectively.

The denial of Petitioner's application

for advancement to warrant officer permanently injured Petitioner's career in the United States Army, and Petitioner therefore retired from active military service in 1962, a Veteran of World War II, Korea and Vietnam.

Commencing in December 1978, Petitioner sought copies of official army records and regulations relating to his warrant officer application. All of the pertinent documentation was furnished, other than a required waiver of educational requirements and the immediate Commanding Officer's recommendation thereon reported not on record. A letter, dated 22 January 1985 from the Army, confirmed that said documents are not a matter of record. It is clearly evident from the record that the Army, in prevalent violation of its own regulations, acted on an incomplete application, first discovered by Petitioner in 1980.

On 13 June 1980 Petitioner filed an

application with the Army Board for Correction of Military Records (ABCMR) seeking reversal of the prior determination which denied Petitioner's advancement to warrant officer status, and requesting back pay from date of denial and appropriate warrant officer grade he would have achieved upon his retirement. Petitioner's application to the ABCMR was predicated upon the provisions of 10 U.S.C. § 1552(a) and (b) which provides for correction of error or removal of injustice, in the interest of justice.

Via determination on 12 January 1981 the ABCMR denied Petitioner's application. The Petitioner then requested reconsideration on 30 June 1981. The ABCMR denied the application on 31 March 1982 finding: "Applicant has failed to submit sufficient relavant evidence to demonstrate the existence of probable material error or injustice..".

Petitioner thereafter, pursuant to

AR 15-185, sought appeal, which was subsequently denied by Respondent in a letter on 20 July 1982. The letter in part stated substantially that the denial constituted final agency action; that Petitioner was not barred from asking for reconsideration upon discovery of <u>additional</u> substantive evidence; and that Petitioner has the right to institute action in a Federal Court. A copy of the letter is attached Appendix D.

Petitioner thereafter commenced suit in the Federal District Court on 23 February 1983 pursuant to 10 U.S.C. § 1552 and 28 U.S.C. § 1346 and § 1361 arguing denial of his application for warrant officer appointment, constituted an abuse of discretion, was unsupported by substantial evidence, was violative of due process and equal protection rights, was against the great weight of evidence, and constituted an administrative action arbitrary and capricious in nature, and was in violation

by the Army of its own regulations.

Following cross motions for summary Judgment, the District Court entered its determination granting Respondent's motion and dismissing Petitioner's cause of action. Significantly, Respondent had abandoned denial of violations in his motion grounds.

The Court of Appeals, in affirming the District Court, held "an attempt to pursue administrative remedies that begins after the limitations period has run does not revive the cause of action as the court in Geyen...correctly held." (28 U.S.C. § 2401 (a)).

REASONS FOR GRANTING THE WRIT

1) THE FEDERAL QUESTIONS HEREIN HAVE BEEN DECIDED BELOW IN A WAY WHICH IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The decision below directly conflicts with the principles in this Court's granting certiorari where conflict exists

between decisions of Courts of Appeals for two or more circuits, and where continuance of important federal questions were presented, as in Donaldson, Jackson, Knetsch, Rogers, U.S. and Yellin, respectively. (Citations omitted).

2) THE FEDERAL QUESTION HEREIN HAS NOT HERETOFORE BEEN DETERMINED BY THIS COURT.

As pointed out herein, the holding of the conflicting opinion by the Court below negates the express purpose and intent of the statutory provisions for Petitioner's relief of error or injustice, as conferred by 10 U.S.C. § 1552(a) and (b), as well as the equal protection rights under the First and Fifth Amendments to the United States Constitution.

Significantly, 10 U.S.C. § 1552 and AR 15-185 have no restrictions with respect to types of issues and time of discovery and where the interest of justice are a raised factor.

This writ raises a novel question of interpretations relating to the Exhaustion of Administrative Remedies Doctrine, as the same relates to the operation of Military Correction Boards, or ABCMR herein.

In Committee for GI Rights, this court restated its general rule requiring exhaustion of military remedies as predicate to relief for members of armed forces in civil courts.

In Ogden, this court affirmed the purpose of the Board for Correction of Military Records, was not intended to preclude judicial review. Petitioner herein contends the arbitrary and capricious administrative action of the ABCMR itself do give rise to his cause of action, not the errors or omissions or injustice which did indeed occurred during Petitioner's period of military service. As the final agency determination was had in July 1982, commencement of civil suit for relief in

February 1983 is timely under all recognized law.

This question has been addressed by at least five Circuit Courts of Appeals, four Courts of Claims and four District Courts, with the majority of the cases, cited below, ruling the commencement of the statute of limitations begins with the final determination of the administrative agency, not with the initial military actions complained of, herein, and as in Ballenger, Bard, Baxter, Bishop, Brin, Calhoun, Eicks, Hamlin, Hodges, Kaiser, Martin, Mulvaney, Powell, Quinn, Sherengos, Simmons, Uhley, Von Hoffburg, Walters, Wood and Yagjian. (citations omitted).

In Kaiser, this court stated it was aware of only two federal courts, to wit: Baxter and Mulvaney which studied in detail the case precedence on these issues. The Kaiser determination found an "interest of justice" outweighed any governmental argument of

Prejudice, and allowed the application to be heard before the court, ruling the government had waived any previous right to assert an equitable defense of laches, by reason of the prior preceedings in the agency.

In Yee, this court held wherein the military board failed to correct an injustice clearly documented, in failure to so do constituted arbitrary and capricious determination subject to reversal. Other courts have declined to confer jurisdiction, and the intervention of This U.S. Supreme Court is required to finally adjudicate this pressing and important question of great concern to all Veterans.

3) THE DECISION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME SUBJECT MATTER.

In holding that the Petitioner is barred by the six year statute of limitations, 28

U.S.C. § 2401(a), the Court of Appeals has departed from the procedure applied by other Courts in similar fact situations, as cited in above respective cases.

4) THE DECISION OF THE COURT OF APPEALS IN THIS CASE SANCTIONED A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS BY THE DISTRICT COURT.

Applying the Geyen v. Marsh determination on the issue of tolling, the Court of Appeals' decision acted to accept the determination on which other Circuit, Claim and District Courts are in conflict.

The District Court memorandum decision adopted in its entirety, the argument presented by the Respondent, and failed to fairly consider opposing judicial case law cited above. The District Court's Cavalier treatment of Petitioner's application is apparent from the record, and the Court's failure to fairly and comprehensively consider the issues raised by Petitioner

itself constitued a departure from accepted standards of judicial proceedings and statutory provisions established.

The District Court adopted as fact allegations raised by the Respondent, without affording Petitioner full opportunity to rebut, and without the benefit of any evidentiary hearing. The Court's failure to establish an accrual date for the cause of action effectively denied Petitioner his Constitutionally protected rights under the Fifth and First Amendments, as well as statutory law, aforementioned.

As previously pointed out in Ogden, the court held creating Boards for Correction of Military Records, was intended to take place of private bills for relief from error or injustice at hands of armed forces, and was not intended to preclude judicial review.

CONCLUSION

Certiorari is warranted in order that a conflict in law as determined by Federal Circuit Courts may be resolved, and that Petitioner may receive treatment consistent with the treatment afforded Veterans in cases with similar facts before other Circuit Courts.

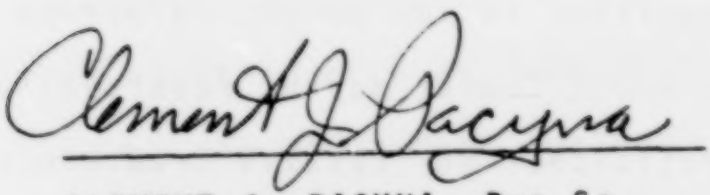
This issue is of great importance to Petitioner and all Veterans similarly situated.

The availability of consistent relief through the Federal Courts from Military Correction Boards will be effectively denied, unless the issue of the statute of limitations accrual is finally determined, with respect to Veterans grievances.

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari,

and summarily reverse the judgment below.

Respectfully submitted,



CLEMENT J. PACYNA, Pro Se
1151 Wehrle Drive
Williamsville, New York 14221
(716) 632-4078

24 April 1985.

APPENDICES

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of November, one thousand nine hundred and eighty-four.

Present: Honorable Henry J. Friendly,
Honorable Ralph K. Winter,
Honorable George C. Pratt,
Circuit Judges.

CLEMENT J. PACYNA,
Plaintiff-Appellant,

v. Docket No. 84-6200

JOHN O. MARSH, JR.
Defendant-Appellee.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

We affirm for the reasons stated in the

district court's opinion. An attempt to pursue administrative remedies that begins after the limitations period has run does not revive the cause of action, as the court in Geyen v. Marsh, 587 F. Supp. 539 (W.D. La. 1984), correctly held. Appellant's argument that as a retired officer he is on active duty for the purposes of the tolling provision of the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. app. S 511 (1982), is without merit.

Affirmed

/s/ HON. HENRY J. FRIENDLY, USCJ

/s/ HON. RALPH K. WINTER, USCJ

/s/ HON. GEORGE C. PRATT, USCJ

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23d day of January, one thousand nine hundred and eighty-five.

Present: HON. HENRY J. FRIENDLY
HON. RALPH K. WINTER
HON. GEORGE C. PRATT
Circuit Judges,

CLEMENT J. PACYNA,
Plaintiff-Appellant,

v.

No. 84-6200

JOHN O. MARSH, JR.,
Defendant-Appellee.

A petition for a rehearing having been filed herein by plaintiff-appellant, Clement J. Pacyna, pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the Court
s/Elaine B. Goldsmith
Clerk

FILED: 23 January 1985

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MEMORANDUM DECISION
CIV-83-205-C

CLEMENT J. PACYNA,
Plaintiff,

v.

JOHN O. MARSH, JR.,
Secretary of the Army,
Defendant.

In this case, plaintiff seeks review of a final decision of the Secretary of the Army. Defendant moves to dismiss on the ground that plaintiff has failed to state a claim and, in the alternative, for summary judgment. The basis for these motions is lack of jurisdiction, statute of limitations, and laches.

The history of this litigation is a long one. It began in 1951, when plaintiff was serving as a mater sergeant and applied for an appointment as a warrant officer in the Counter-Intelligence Corps (CIC). Although he received approval from his local commanders, on January 3, 1952, he was informed that his application did not receive final approval.

Plaintiff continued in military service until 1962, when he retired from the Army with the status of "retired reserve."

Nothing occurred after that until February of 1979, when plaintiff made an application through the Freedom of Information Act and examined his personnel file..

On June 13, 1980, plaintiff filed an application with the Army Board for Correction of Military Records (ABCMR), seeking to have his 1952 promotion denial reversed and his records corrected accordingly. Plaintiff claims that his application was timely because it was filed within three years after he discovered the error in his record. In the fall of 1980, the ABCMR solicited and obtained an advisory opinion from the Office of the Judge Advocate General. A copy of the opinion, which recommended that plaintiff's claim be denied, was sent to him for his comment. Plaintiff responded in February of 1981..

After considering plaintiff's response, the Board concluded that plaintiff had not given any reason to explain why the action not to appoint him was illegal or in violation of regulations. The Board also held that his failure to timely file his application had made efforts by the Army to investigate his claim difficult. Because of his 28-year delay in challenging the decision made in 1952, only limited documentation is available. This decision was affirmed by the Secretary of the Army on June 7, 1982. Plaintiff's suit followed in February, 1983, with plaintiff claiming that failure to appoint him as a warrant officer was an abuse of discretion and a violation of his rights. He seeks an order of the court appointing him to the rank of warrant officer and retirement pay, including back payment to the time of the initial denial.

Assuming for the moment that this court has jurisdiction, it is clear that plaintiff's claim is barred by the statute of limitations. 28 U.S.C. §2401(a) provides that a civil suit against the United States must be commenced within six years after the right of action first accrues. The statute may not be waived in actions against the United States.. United States v. Kubrick, 444 U.S. 111 (1979). "(A) cause of action is deemed to have accrued when facts exist which enable one party to maintain an action against another." Konecny v. United States, 388 F.2d 59, 65 (8th Cir. 1967), quoting Great American Ins. Co. v. Louis Lesser' Enterprises, Inc. 353 F.2d 997, 1001 (8th Cir. 1965).

The file in this case was complete in 1952, when plaintiff's application for

promotion was rejected. Plaintiff argues that he was not able to obtain the facts until he looked at his personnel file through a Freedom of Information Act Procedure in 1979, but there was no reason why he could not have reviewed his personnel records at an earlier date. Even if the statute of limitations was tolled during the period plaintiff remained on active duty, pursuant to the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S. C. App. §501 et seq., his cause of action would have accrued upon his retirement in 1962.

Cases such as Kaiser v. Secretary of the Navy, 525 F. Supp. 1226 (D. Col. 1981), cited by Plaintiff in support of his application, do not apply here. The statute of limitations did not apply in Kaiser, because the nature of the relief sought in that case was to correct a discharge from dishonorable to honorable. In that type of case, or cases in which the applicant seeks to expunge the judgment of a court martial, the statute of limitations is not a bar. However, in cases like the present one where the relief sought is money, the sta- of limitations is a bar if the case is untimely filed. In this case, the plaintiff

wants his records corrected and, at the same time , he wants the government to increase his retirement pay.

Plaintiff cannot revive his claim by applying to the ABCMR in 1981 and claiming that the 1982 decision revived the jurisdictional statute. To do this would permit a plaintiff to have the power to avoid the jurisdictional bar every time he submitted an application which was considered by the Board. Thus, whether his claim accrued in 1952 or at the time of his retirement in 1962, the time to institute the suit has long passed.

Although the government vigorously urges that the court does not have jurisdiction under any theory, I find that there is jurisdiction under 28 U.S.C. §1346. Plaintiff has waived his claim to any monetary award over $10,000.00.

Defendant's motion for summary judgment is granted, and the complaint is dismissed.

So ordered.

/s/ JOHN T. CURTIN
USDJ

Dated: March 7, 1984.

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310
20 Jul 1982

SFMR

Mr. Timothy R. Lovallo, Esq.
950 Ellicott Square Building
Buffalo, New York 14203

Dear Mr. Lovallo:

This is in reply to your letter of 7 July 1982 to the Deputy Assistant Secretary concerning the case of Master Sergeant Clement J. Pacyna, 106-05-7846, United States Army Retired.

Your vigorous dissent has been noted. However, all evidence currently of record clearly indicates that there was no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as a warrant officer in 1952.

Please be advised that within the Department of Defense, the authority to effect the change you seek in Sergeant Pacyna's records can be exercised only through the Board for Correction of Military Records. Accordingly, there is no higher administrative appeal within the Department of Defense.

Shoukd you discover additional substantive evidence not previously submitted, you may ask for reconsideration of Sergeant Pacyna's case. Otherwise this letter constitutes final agency action on his request for correction of military records. However, if you desire additional review of the Board's actions, then you have the right to institute action in a Federal court of competent jurisdiction.

Sincerely,

/s/JOHN W. MATTHEWS
Executive Secretary
Board for Correction
of Military Records

OPPOSITION

BRIEF

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1706

In the Supreme Court of the United States

OCTOBER TERM, 1985

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Washington, D.C. 20530
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BEST AVAILABLE COPY

QUESTION PRESENTED

Under 28 U.S.C. 2401(a), civil actions against the United States must be commenced "within six years after the right of action first accrues." The issue presented in this case is whether petitioner's cause of action challenging the Army's decision not to promote him to warrant officer first accrued at the latest upon his discharge from the Army in 1962, or approximately 20 years later when the Army Board for Correction of Military Records rejected his application for review of that decision.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1706

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) and the opinion of the district court (Pet. App. C1-C5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1984. A petition for rehearing was denied on January 23, 1985 (Pet. App. B1). The petition for a writ of certiorari was filed on April 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2401(a) provides in pertinent part:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

2. 10 U.S.C. 1552 provides in pertinent part:

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

STATEMENT

1. Petitioner is a former Army master sergeant who voluntarily retired from active duty in 1962 after completing 20 years of military service. In August 1951, while serving as a counter-intelligence agent in the Army, petitioner applied for an appointment as a warrant officer in the Counter-Intelligence Corps (CIC). His superior officers, as well as a board of officers, recommended his selection, but the CIC ultimately declined to approve the appointment because petitioner did not meet the educational requirement for the position. Pet. App. C1.[1] On January 22, 1952,

[1]Under Army and CIC regulations in force at the time, an applicant for a warrant officer position was required to have completed two years of college or the equivalent (C.A. App. 149; see also *id.* at 144-145). Petitioner left high school in the ninth grade and later obtained a high school equivalency certificate (*id.* at 119). Although an applicant could request a waiver of this requirement (*id.* at 149), petitioner's records do not indicate that he made such a request. Moreover, it was determined at the time that petitioner's record did not justify the grant of a waiver (*id.* at 138).

petitioner's commanding officer informed him that his application had not been approved (C.A. App. 141).

Twenty-seven years later, in February 1979, petitioner requested and obtained his military personnel records from the Department of the Army. The following year, on June 13, 1980, he applied to the Army Board for Correction of Military Records seeking correction of his records to reflect a promotion to warrant officer retroactive to 1952. Pet. App. C2. On February 25, 1981, following a thorough analysis of petitioner's application, his military records, and other materials, the Board concluded that petitioner had failed to furnish any material evidence indicating that the decision not to promote petitioner to warrant officer violated any statute or regulation. The Board also concluded that petitioner's failure to file a timely claim made it impossible to obtain evidence concerning his claim.[2] Accordingly, the Board denied petitioner's application and notified him of its decision. C.A. App. 39-43. Petitioner sought reconsideration of the Board's decision on four separate occasions, and each of these requests was denied (*id.* at 202).

2. On February 23, 1983, petitioner commenced this action in the United States District Court for the Western District of New York challenging the Correction Board's

[2]Among other factors, numerous reorganizations within the Army had occurred in the 28 years between the 1952 personnel decision challenged by petitioner and the filing of his application for correction of his records (C.A. App. 43), including the elimination of the CIC as a separate entity.

decision. Petitioner alleged that the district court's jurisdiction was based upon the Tucker Act, 28 U.S.C. 1346, and the mandamus statute, 28 U.S.C. 1361 (C.A. App. 2). He claimed that the Board had abused its discretion in denying his application and sought an order correcting his records to reflect a promotion to warrant officer in 1952 and awarding him back pay retroactive to 1952, including increased retirement pay (*id.* at 5; Pet. App. C3). The district court granted the government's motion for summary judgment and dismissed the complaint (Pet. App. C1-C5), holding that petitioner's claim had accrued, at the latest, upon petitioner's retirement in 1962, and was barred by 28 U.S.C. 2401(a), which establishes a six-year statute of limitations for civil actions against the United States (Pet. App. C3-C5).

The court of appeals affirmed in an unpublished order (Pet. App. A1-A2). It adopted the reasoning of the district court's opinion, stating that "[a]n attempt to pursue administrative remedies that begins after the limitations period has run does not revive the cause of action" (*id.* at A2).

ARGUMENT

1. At the outset, we note that there is a jurisdictional defect in the decision below. The Court of Appeals for the Second Circuit lacked jurisdiction over petitioner's appeal because 28 U.S.C. 1295(a)(2) allocates exclusive jurisdiction over the appeal in this case to the Court of Appeals for the Federal Circuit. Section 1295(a)(2) provides that the Federal Circuit has "exclusive jurisdiction" of "an appeal from a final decision of a district court of the United States * * * if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title." Petitioner's complaint sought money damages and expressly relied upon the district court's jurisdiction under 28 U.S.C. 1346 (see C.A. App. 2). Indeed, the district court specifically found "that there is jurisdiction under 28 U.S.C. § 1346" (Pet. App.

C5). Petitioner therefore was required to appeal the dismissal of his complaint to the Federal Circuit. See *Van Drasek* v. *Lehman*, 762 F.2d 1065 (D.C. Cir. 1985).

However, this defect is not by itself sufficient to justify the exercise of this Court's discretionary authority to vacate the judgment of the court of appeals and order the court of appeals to transfer the appeal to the Federal Circuit pursuant to 28 U.S.C. 1631.[3] The Second Circuit's determination in this case is correct, accords with the settled rule in the Federal Circuit concerning the issue presented on appeal, and does not conflict with any decision of this Court or any other court of appeals. The exercise of this Court's discretionary authority therefore is not warranted.

2. a. Petitioner challenges a 30-year old decision by the Army denying his application for a promotion to the position of warrant officer. As this Court has recognized, a plaintiff's cause of action accrues for statute of limitations purposes "when there is a breach of duty owed the plaintiff." *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953). Petitioner was advised in January 1952 that he would not be promoted to the position of warrant officer; his cause of action therefore accrued at that time, or, at the latest, upon his discharge from the service in 1962. See *Walters* v. *Secretary of Defense*, 725 F.2d 107, 114-115 (D.C. Cir. 1983); *Nichols* v. *Hughes*, 721 F.2d 657, 659-660 (9th Cir. 1983); *Ballenger* v. *Marsh*, 708 F.2d 349, 350 (8th Cir. 1983); *Cowhig* v. *Marsh*, 693 F.2d 234, 235 (1st Cir. 1982), cert. denied, 460 U.S. 1092 (1983); *Boruski* v. *United*

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[3] In *United States* v. *Squillacote*, cert. denied, No. 84-1284 (Apr. 15, 1985), the Seventh Circuit had improperly asserted appellate jurisdiction over a claim under 28 U.S.C. 1346, but this Court denied our petition for a writ of certiorari seeking the vacation of the judgment of the court of appeals so that the appeal could be transferred to the Federal Circuit.

States, 493 F.2d 301, 304 n.5 (2d Cir.), appeal dismissed, 419 U.S. 808 (1974), cert. denied, 421 U.S. 1013 (1975); *Mathis* v. *United States*, 391 F.2d 938, 938-939 (Ct. Cl. 1968), aff'd on rehearing, 421 F.2d 703 (1970). Since an action against the United States must be filed "within six years after the right of action first accrues" (28 U.S.C. 2401(a)), and petitioner plainly failed to satisfy this requirement, the courts below correctly concluded that petitioner's action was time-barred.[4]

Petitioner asserts (Pet. 11) that the statute of limitations did not begin to run until the Correction Board issued its decision in 1981. However, in *Soriano* v. *United States*, 352 U.S. 270 (1957), this Court rejected the argument that a claim does not accrue until after an administrative remedy has been exhausted. Construing 28 U.S.C. 2501, a limitations provision almost identical to Section 2401 that governs actions in the Claims Court, the Court concluded that "to say that the exhaustion of administrative remedies in such case is a prerequisite to the jurisdiction of the Court of Claims would but 'engraft [another] disability upon the statute' and thus frustrate the purpose of Congress. Furthermore, it would be a limitless extension of the period of

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[4]Petitioner contends (Pet. 9) that his efforts to obtain information about the reasons he was not promoted to warrant officer were thwarted by his superiors and that he was not able to ascertain the facts until he obtained copies of documents from his personnel file through the Freedom of Information Act in 1979. The district court found (Pet. App. C4) that there was no reason petitioner could not have reviewed his personnel records prior to 1979. Since this factual finding implicitly was affirmed by the court of appeals, it is not worthy of review in this Court. *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, No. 83-1935 (Apr. 23, 1985), slip op. 8; *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). In any event, petitioner's contention is baseless. Army regulations in force during the period in question enabled servicemen to review their own personnel files upon request. See Army Reg. 345-20, para. 15(e)(3) (Mar. 9, 1951); Army Reg. 345-20, para. 15(e) (Mar. 9, 1956).

limitation that Congress expressly provided for the prosecution of claims against the Government in the Court of Claims. This we cannot do" (352 U.S. at 275).

Petitioner's argument fails for the same reason. Under his theory, a person seeking to challenge any military personnel decision could apply to the Correction Board and, following denial of his claim, file a suit seeking judicial relief. The statute of limitations essentially would be eliminated as a bar to actions challenging such decisions.[5]

Moreover, petitioner's argument is not novel; the Court of Claims repeatedly rejected this precise argument, and this Court consistently declined to review those decisions. See *Bonen* v. *United States*, 666 F.2d 536, 539 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); *Ramsey* v. *United States*, 215 Ct. Cl. 1042 (1978), cert. denied, 439 U.S. 1068 (1979); *Bruno* v. *United States*, 556 F.2d 1104, 1106 (Ct. Cl. 1977); *Brundage* v. *United States*, 504 F.2d 1382, 1385 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975); *Mathis* v. *United States*, *supra*; *Friedman* v. *United States*, 310 F.2d 381, 396-403 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963).

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[5]The Federal Circuit does not require a plaintiff to apply to the Correction Board before seeking relief in court (see, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1155 (1983)). Other courts do require exhaustion of the administrative remedy, but that position is not inconsistent with our argument that the statute of limitations begins to run when the underlying military decision occurs. A serviceman should have ample time to pursue the administrative remedy before the expiration of the six-year statute of limitations and then file an action in court. In addition, a claimant who files an application with a Correction Board within six years of the underlying events might be able to argue that the running of the limitations period should be tolled pending action by the Board, but petitioner—who waited 28 years to seek administrative relief—is in no position to raise such an argument.

Petitioner also cannot argue that the Administrative Procedure Act supplies a new cause of action for review of the Correction Board's decision because that statute only waives sovereign immunity for actions "seeking relief other than money damages" (5 U.S.C. 702). Petitioner's action for damages under the Tucker Act obviously does not fall within this category.

b. Petitioner's contention that there is a conflict among the courts of appeals on the issue presented by this case is simply incorrect. None of the appellate decisions cited by petitioner (see Pet. 11) holds that a decision by a Correction Board is a prerequisite to the accrual of a claim for statute of limitations purposes. Indeed, in several of the recent decisions cited by petitioner the courts rejected the plaintiffs' arguments that their claims had not accrued and held that the claims were barred by the statute of limitations. See *Walters* v. *Secretary of Defense, supra*; *Calhoun* v. *Lehman*, 725 F.2d 115 (D.C. Cir. 1983); *Nichols* v. *Hughes, supra*; *Ballenger* v. *Marsh, supra*.[6] The rest of the appellate decisions cited by petitioner are completely irrelevant to the issue presented here. Thus, there is no conflict warranting review by this Court.[7]

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[6]Although some district courts have held that a cause of action such as petitioner's accrues at the date of the Correction Board's decision, those cases did not involve a claim for money damages such as petitioner's claim in this case. Moreover, most of those decisions either failed to analyze the issue at all or were based on district court precedent from other jurisdictions that has since been compromised or severely undermined. See, *e.g.*, *Kaiser* v. *Secretary of Navy*, 525 F. Supp. 1226 (D. Colo. 1981) (relying on cases from or based on D.C. Circuit or Court of Claims decisions); *Yagjian* v. *Marsh*, 571 F. Supp. 698 (D.N.H. 1983) (relying on *Kaiser*); *Bethke* v. *Stetson*, 521 F. Supp. 488 (N.D. Ga. 1979), aff'd mem., 619 F.2d 81 (5th Cir. 1980) (Table). A district court decision holding in favor of the government on this issue, which was cited by the Second Circuit in its order of affirmance, is pending on appeal before the Fifth Circuit. *Geyen* v. *Marsh*, 587 F. Supp. 539 (W.D. La. 1984), appeal pending, No. 84-4607.

[7]Finally, petitioner offers absolutely no legal or factual support for his statements (Pet. 9) that the decisions of the courts below violated his First and Fifth Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1985

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REPLY

BRIEF

Supreme Court, U.S.
FILED
AUG 7 1985
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No. 84-1706

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October Term, 1984

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

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OPINIONS BELOW

The opinion of the court of appeals(Pet. App.A1-A2) and the opinion of the district court (Pet. App. C1-C5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1984. A petition for rehearing was denied on January 23, 1985 (Pet. App. B1). The petition for a writ of certiorari was filed on April 18, 1985. The brief for the Respondent in opposition was served on Petitioner on August 1, 1985. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

POINT I

THE QUESTION PRESENTED BY RESPONDENT (pg. i) IS INCORRECT.

The issue presented in this case is not whether the cause of action accrued at the latest in 1962 or 1982 as Respondent contends, but whether court erred in barring action accrued in 1982 challenging the Respondent's arbitrary and capricious final agency denial, conferred by 10 U.S.C. § 1552 and 28 U.S.C. § 1361 (Pet. writ pg. 3,7). There can be no bar to this suit by the six-year limitation under 2401(a) on a cause of action tolling to 1988 under existing law. Thus Petitioner's case has merit in fact and law.

POINT II

RESPONDENT CONTINUES TO MISREPRESENT A MOOT ISSUE.

Although alleged Army violations was not a ground raised in Respondent's motion to dismiss, etc. (Pet. App. C1), which renders the matter moot, he continues to misrepresent the facts (Resp. Pg. 2,3). For example: 1) Respondent claims that Petitioner was informed that "his application had not been approved", but withheld that

notification was without statutory required reasons given for promotion denial; 2) that it is impossible to obtain evidence concerning Petitioner's claim, but withheld that the record on appeal clearly presents all papers re the application except a statutory required educational waiver and commander's recommendation on the waiver, which the Army lost and without which CIC ruled on an incomplete application; and 3) that both actions are violative of Army Regulation 600-148 (Pet. writ pg. 3).

POINT III

RESPONDENT MISREPRESENTS THE FACTS IN CASE LAW PRESENTED.

Respondent's claim that case law presented by Petitioner is simply incorrect, is misrepresentative. In fact Respondent is mistaken on the case law upon which he himself relies (Resp. pg. 8). For example: 1) In Walters, the Court held that "the cause of action does not accrue until appropriate...review board denies the servicemember's request for...", and thus Walters' "cause of action HAS NOT YET ACCRUED AND THE STATUTORY TIME UNDER SECTION 2401(a) HAS NOT YET BEGUN TO RUN", whereby Court reversed and remanded; 2)

In Calhoun, the Court held "that section 2401(a) applies to an action brought over ...12 years after the last administrative review taken", not applicable to this case; 3) In Kaiser, the Court held that "most...view is that § 2401(a) requires that a suit for review be filed within six-years of the final decision by the military board of review", applicable to this case; 4) In Geyen, upon which Respon dent and the Court below rely in error that Geyen's case was time barred, the Court dismissed "under the alternative ground of laches", not applicable to Petitioner's case; and 5) case law presented by Respondent (Resp. pg. 5,6) are not applicable to military under 10 USC 1552.

POINT IV

JURISDICTIONAL DEFECT RAISED.

Respondent did not appeal a jurisdictional defect in the decision below, which he claims required Federal Circuit appeal but now selfserving wants the decision below in his favor in error approved, which would otherwise necessitate vacature and/or remand (Resp. pg. 4,5).

POINT V

RESPONDENT'S CONTENTION THAT PETITIONER'S FIRST AND FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED, IS SIMPLY INCORRECT.

(Resp. pg. 8) Correctly, Petitioner's FIRST and FIFTH Amendment rights were prevalently violated upon: 1) Army violations of its own regulations; 2) Order not to question higher authority; 3) Respondent's arbitrary and capricious actions; 4) District Court error barring suit and Court below affirming; 5) conflict by Court below with other federal courts on same subject matter; and 6) all of the foregoing, which undermines the Constitution , statutory requirements and Congressional intent.

POINT VI

The interest of justice outweighs any governmental argument of prejudice.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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Dated: 5 August 1985

SUPPLEMENTAL BRIEF

(3)

No. 84-1706

Supreme Court, U.S.
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CLERK

In THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

CLEMENT J. PACYNA, PETITIONER

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JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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No. 84-1706

In THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

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JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals(Pet. App.A1-A2) and the opinion of the district court (Pet. App. C1-C5) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petition for writ of certiorari is pending consideration.

STATUTORY PROVISION INVOLVED

Constitution of the United States, Amendment XIV: "No...shall deny to any

person within its jurisdiction the equal protection of the laws." 1/

PRELIMINARY STATEMENT

This is an "interest of justice" case, one of great importance to all military veterans, involving violation by the Courts below of the "equal protection clause", hereof, by summary justice so flagrant and fundamental as to require reversal or remand anyway.

ARGUMENT

AMENDMENT RIGHTS WERE VIOLATED
Contrary to Respondent (Resp. 8)

The United States Supreme Court has stated that the "equal protection clause" of the Fourteenth Amendment means, quote:

"That no person ... shall be denied the same protection of the laws which is enjoyed by other persons ... in the same place and under like circumstances." Manes v. Goldin, 400 F. Supp. 23, 1975.

In order to have "equal protection of law", where there was an intervening action 2/ in which there are provisions for Respondent to cure for error or injustice

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1/ Pet. was unaware of law at last filing.

2/ Respondent intervened(Pet. App.D1-D2).

in the interest of justice under 10 U.S. C. 1552(a)&(b) (Resp. 2), the Plaintiff is entitled to challenge an arbitrary and capricious denial under 28 U.S.C. 1361, an action in the nature of mandamus to compel an officer of the United States to perform a duty owed the Plaintiff(Pet. 2).

Under the above circumstance, suit filed within 6 years of a final intervening agency action is not a bar under 28 U.S. C. 2401(a). (Resp. 1), but rather is alive for judiciary review to protect veterans from error or injustice at hands of armed forces. (Pet. 14).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Dated: December 2, 1985

OPINION

SUPREME COURT OF THE UNITED STATES

CLEMENT J. PACYNA *v.* JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84–1706. Decided January 21, 1986

PER CURIAM.

Certiorari is granted. The judgment is vacated and the case is remanded for the Court of Appeals to transfer the case pursuant to 28 U. S. C. § 1631 to the Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(2).

It is so ordered.